

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       DONALD CURTIS SAMSON,                                 :

4                               Petitioner,                                 :

5               v.   :   No. 04-9728

6       CALIFORNIA.   :

7       - - - - - x

8   Washington, D.C.

9   Wednesday, February 22, 2006

10               The above-entitled matter came on for oral

11       argument before the Supreme Court of the United States

12       at 10:16 a.m.

13       APPEARANCES:

14       ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf

15               of the Petitioner.

16       RONALD E. NIVER, ESQ., San Francisco, California; on

17               behalf of the Respondent.

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20               the United States, as amicus curiae, supporting the

21               Respondent.

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P R O C E E D I N G S

[10:16 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument  
first this morning in Samson versus California.

Mr. Long.

ORAL ARGUMENT OF ROBERT A. LONG, JR.,  
ON BEHALF OF PETITIONER

MR. LONG: Mr. Chief Justice, and may it  
please the Court:

The search in this case was not based on  
individualized suspicion, and no other adequate  
safeguards limited the police officer's discretion to  
search Petitioner. For this reason, the search, which  
would not be permitted by virtually any other State or  
by the Federal Government, was unreasonable.

The Court has reaffirmed many times that the  
fourth amendment does not permit the individual officer  
in the field to exercise unconstrained discretion to  
search. The Court has said that the fourth amendment  
is primarily directed at the evil -- it was primarily  
directed at the evil of general warrants and writs of  
assistance, and the evil of general warrants and writs  
of assistance was that they gave individual officers  
blanket authority to search where they pleased and  
placed the liberty of every man in the hands of every

1     petty officer.

2                   JUSTICE GINSBURG:   Mr. Long --

3                   CHIEF JUSTICE ROBERTS:   Mr. Long --

4                   JUSTICE GINSBURG:   -- with respect to  
5     liberty, as it -- it's not disputed, is it, that your  
6     client could have had his parole revoked even though  
7     the search was suspicionless?  So, we're talking about  
8     the difference between revocation of parole, on the one  
9     hand, and a separate criminal offense.  Is that right?

10                  MR. LONG:  Well, a parolee has conditional  
11     liberty.  But, at the time of this search, Mr. Samson  
12     was on parole, there was no suspicion of any wrongdoing  
13     --

14                  JUSTICE GINSBURG:  But I thought that  
15     evidence seized could be introduced, could be a basis  
16     to revoke parole.

17                  MR. LONG:  Oh, well, the Court held, in the  
18     Scott case, that the exclusionary rule does not apply  
19     at parole revocation hearings.  So, if there is an  
20     unreasonable search of a parolee that violates the  
21     fourth amendment, the evidence could not be admitted at  
22     a criminal trial, but it could be admitted at a parole  
23     revocation --

24                  JUSTICE GINSBURG:  So, the -- what the -- the  
25     consequence here is whether --

1 MR. LONG: I --

2 JUSTICE GINSBURG: -- he will have his parole  
3 revoked --

4 MR. LONG: I --

5 JUSTICE GINSBURG: -- or he will have a  
6 separate criminal offense.

7 MR. LONG: I understand your question. In  
8 California, Justice Ginsburg, a nonviolent drug  
9 offense, the possession of a small amount of an illegal  
10 substance, is not a basis for revocation of parole. It  
11 is not possible to revoke parole in California for this  
12 offense. So, parole revocation would not have been a  
13 possibility here.

14 JUSTICE KENNEDY: Well, Justice Ginsburg, I  
15 suppose, can pursue her own line of questioning, but  
16 let me ask you this, because I -- her question suggests  
17 this, to me at least. Suppose the parole officer said,  
18 "Now, look, I'm going to search you. If you don't  
19 consent, then I'm going to revoke your parole."

20 MR. LONG: Well, this, of course, was a  
21 police officer, not a parole officer.

22 JUSTICE KENNEDY: I --

23 MR. LONG: But if --

24 JUSTICE KENNEDY: Well, I -- my question was  
25 a parole officer, and I'll get to police officer next.

1           MR. LONG: All right. I think if a parole  
2 officer said, "You must consent to this search" --

3           JUSTICE KENNEDY: When you see the --

4           MR. LONG: -- "this particular search" --

5           JUSTICE KENNEDY: -- person on the street, et  
6 cetera, et cetera.

7           MR. LONG: "And, if you don't, I'll revoke  
8 your" -- I mean, the consent is not, in this case,  
9 first. I mean, California has said, the Supreme Court  
10 has said, parole, in the parole search condition, is  
11 imposed as a matter of law. Your hypothetical poses a  
12 question of, Could there be knowing and voluntary  
13 consent to a search if the consequence of refusing is  
14 revocation of parole? I would argue, in that  
15 situation, that the consequences of refusal are so dire  
16 that, effectively, the parolee would have no real  
17 choice but to consent. So, it would be, in a sense, a  
18 coerced consent.

19           JUSTICE SCALIA: Why are they dire? I mean,  
20 he's just back in the situation he would have been in,  
21 did he not comply with the conditions of his parole. I  
22 don't see that that's dire. He has a choice. He can  
23 stay in prison and --

24           MR. LONG: Well --

25           JUSTICE SCALIA: -- and suffer the reduction

1 of privacy there, which is much, much greater than  
2 being subjected to -- I mean, he -- he cannot even go  
3 to the toilet in privacy. Or he can go out on parole,  
4 subject to the condition that --

5 MR. LONG: Well --

6 JUSTICE SCALIA: -- that he --

7 MR. LONG: I mean --

8 JUSTICE SCALIA: -- he can --

9 MR. LONG: I --

10 JUSTICE SCALIA: -- be searched.

11 MR. LONG: I have two answers to that,  
12 Justice Scalia. I mean, first, in California, you  
13 finish your prison sentence, and then parole is a  
14 separate period that happens. The California Supreme  
15 Court said, in *People v. Guzman* and other cases, parole  
16 is not a part of the sentence --

17 JUSTICE SCALIA: No, but it's --

18 MR. LONG: -- in California.

19 JUSTICE SCALIA: -- but it's also clear from  
20 the California statute that it is not a right, that  
21 it's a privilege, that you get the privilege of parole  
22 in exchange -- in exchange for agreeing to the  
23 conditions, one of which is that you can be searched.

24 MR. LONG: Well, it's -- in California, every  
25 inmate gets parole. It's a matter of law. It's not a

1 privilege -- in Morrissey against Brewer. The Court --  
2 in other cases, the Court rejected the rights privilege  
3 distinction anyway.

4 JUSTICE SCALIA: California statute says it's  
5 a privilege, doesn't it?

6 MR. LONG: Yes, in Section 3067.

7 JUSTICE SCALIA: It does.

8 MR. LONG: But it is -- it is also a --  
9 Section 3000 of the California penal code says every  
10 prisoner gets parole. It is imposed on the prisoner as  
11 --

12 JUSTICE SCALIA: Even if the --

13 MR. LONG: -- a matter of law.

14 JUSTICE SCALIA: -- prisoner -- oh, I thought  
15 that he can turn it down, and that some prisoners do,  
16 if --

17 MR. LONG: Well --

18 JUSTICE SCALIA: -- if they decide that they  
19 don't want to be subjected to searches.

20 MR. LONG: The California Supreme Court has  
21 held, in People v. Reyes, and in other cases cited in  
22 our brief, that, in California, parole is not a matter  
23 of choice, it is imposed as a matter of law.

24 JUSTICE SCALIA: Is -- and you mean people  
25 are put out on the street when -- kicking and screaming



1     when they say, "No, I want to stay in jail. I don't  
2     want to be" --

3             MR. LONG: Well, it's --

4             JUSTICE SCALIA: -- "searched. I would  
5     rather stay in jail"? And --

6             MR. LONG: Well --

7             JUSTICE SCALIA: -- they are dragged out --

8             MR. LONG: That --

9             JUSTICE SCALIA: -- into the street. Is that  
10    what happens?

11            MR. LONG: That is what the California  
12    Supreme Court has said.

13            JUSTICE SCALIA: Oh, I --

14            MR. LONG: And what the statutes say is --

15            JUSTICE SCALIA: -- I don't think so.

16            MR. LONG: That -- the statutes say that  
17    parole is a -- is a transitional period, and that every  
18    inmate should undergo a period of parole.

19            But coming back to your earlier question, the  
20    Court has said that the condition of a parolee is very  
21    different from the condition of a prisoner. The Court  
22    said that in Morrissey against Brewer. And the Court  
23    said, in Griffin, as to probationers, that while the  
24    fourth amendment rights of probationers -- and so,  
25    parolees, too, we concede -- are reduced, there are --

1 the State can go too far. And if the State exceeds --

2 CHIEF JUSTICE ROBERTS: Well, but --

3 MR. LONG: -- the permissible limits, it's a  
4 violation.

5 CHIEF JUSTICE ROBERTS: -- their condition is  
6 very different, in a broad range of areas. They -- you  
7 give up first-amendment rights. For example, it's  
8 typical to have a condition of parole that you don't  
9 consort with known criminals or gang members. You --  
10 often it says you must refrain from alcohol. Sometimes  
11 they say you can't go near particular places, if they  
12 think that's going to tempt you to return to a life of  
13 crime. Those are all first-amendment rights that are  
14 sacrificed while you're on parole. Why is this any  
15 different?

16 MR. LONG: Well, there are many rights that  
17 are sacrificed. What the Court has said about the  
18 fourth-amendment rights is, because parolees have  
19 conditional liberty, they will have a reduced, but not  
20 eliminated, fourth-amendment protection --

21 CHIEF JUSTICE ROBERTS: What about a drug --  
22 what if you're convicted of a drug offense, you're on  
23 parole, and one of the conditions is, every week you  
24 have to go in for a drug test?

25 MR. LONG: Well, that --

1 CHIEF JUSTICE ROBERTS: Do you --

2 MR. LONG: -- that would be --

3 CHIEF JUSTICE ROBERTS: -- do you -- is that  
4 acceptable?

5 MR. LONG: That would be different in several  
6 respects, Mr. Chief Justice. First of all, there would  
7 not be discretion. You wouldn't have the individual  
8 officer --

9 CHIEF JUSTICE ROBERTS: But it would be a  
10 fourth-amendment right that you would be giving up --

11 MR. LONG: Yes. And --

12 CHIEF JUSTICE ROBERTS: -- that you would  
13 otherwise have if you weren't on parole.

14 MR. LONG: And I want to be clear, we are not  
15 -- we're arguing there is a broad spectrum of searches  
16 that States can undertake of parolees, and I'm, by no  
17 means, arguing today that all of them, or even most of  
18 them, are unconstitutional. This is a --

19 JUSTICE STEVENS: What would you say about a  
20 condition that you must -- not a regular drug test --  
21 you just have to submit yourself to a drug test  
22 whenever a police officer asks you to?

23 MR. LONG: Well, you know, that would be much  
24 narrower, because it would simply be a drug test. I  
25 think it would have the problems of -- the officer

1 would have complete discretion. If it were like the  
2 California --

3 CHIEF JUSTICE ROBERTS: Well, but it's -- I  
4 mean, the point --

5 JUSTICE STEVENS: Do you think it would  
6 valid? That's what I was asking you.

7 MR. LONG: I think, because that's a much  
8 narrower test, that that could pass muster if -- but I  
9 would think there really ought to be some guidance to  
10 the officer. I think our ultimate submission today is  
11 --

12 JUSTICE KENNEDY: Well, so that a --

13 MR. LONG: -- this is so --

14 JUSTICE KENNEDY: -- so that a burglar could  
15 be searched for burglar tools --

16 MR. LONG: Well --

17 JUSTICE KENNEDY: -- but not for drugs? And  
18 the drug addict can be searched for drugs, and not  
19 burglar tools?

20 MR. LONG: If it were -- if it were tied to  
21 the crime that the parolee has committed, you know,  
22 that would give it some limitation. This is a  
23 completely unlimited search, for anything, any crime.

24 CHIEF JUSTICE ROBERTS: But Justice Stevens's  
25 question highlights the point that you criticize about:

1 the randomness of it is often a critical element. I  
2 suppose it makes much more sense to say you're subject  
3 to a random drug test than that you have to come in at  
4 a scheduled time, when you -- presumably, you could  
5 refrain from using drugs prior to the test. And, to  
6 some extent, it's the same, even if you're not talking  
7 about a drug test.

8 MR. LONG: Well, in all --

9 CHIEF JUSTICE ROBERTS: The search is only  
10 going to be effective if it's not announced or --

11 MR. LONG: Well, in --

12 CHIEF JUSTICE ROBERTS: -- scheduled.

13 MR. LONG: -- and in this Court's  
14 suspicionless search cases, you can have a random test  
15 where you draw names at random. There's some other  
16 process that doesn't leave it up to each individual  
17 officer to decide who gets the drug test or which car  
18 to stop to check the driver's license and registration.

19 What the Court has consistently held as really at the  
20 core of the fourth amendment is this notion of: the  
21 individual officer in the field has complete discretion  
22 to decide, "Do I search this person? Do I not? What's  
23 the scope of the search? What do" --

24 JUSTICE GINSBURG: Are you relying --

25 MR. LONG: -- "I search for?"

1 JUSTICE GINSBURG: -- on the difference  
2 between -- you said "officer in the field." Would this  
3 be okay if it had been his parole officer?

4 MR. LONG: Well, I think --

5 JUSTICE GINSBURG: The parole officer was  
6 walking along the street, saw this guy, and said, "I'm  
7 going to search you."

8 MR. LONG: I think it's a very different set  
9 of circumstances if we have a parole officer. This  
10 Court has said, at least twice, in Griffin and in  
11 Scott, that a parole officer has a different function.  
12 They are not in an adversarial, or a purely  
13 adversarial, relationship. They often think of the  
14 parolee or the probationer as a client. They're trying  
15 to see that the person succeeds. In some sense, the  
16 parole officer fails when the parolee goes back to  
17 prison. The parole -- the parole officer can act on  
18 their entire knowledge and experience with the client,  
19 or the parolee. So, all of that makes a difference.  
20 And the Court has noted that several times.

21 JUSTICE SCALIA: When he's in prison, is  
22 there any problem about the prison guards intruding  
23 upon his privacy, willy-nilly, whenever they choose?

24 MR. LONG: The -- as I understand the Court's  
25 --

1 JUSTICE SCALIA: I mean, walking --

2 MR. LONG: -- holding --

3 JUSTICE SCALIA: -- by his cell, which is  
4 always opened, and checking in on him to see what's --  
5 what he's doing.

6 MR. LONG: As I understand the Court's  
7 holding in Hudson against Palmer, the fourth amendment  
8 does not apply in a prison cell. And --

9 JUSTICE SCALIA: So, he's better off on  
10 parole than -- well, at least no worse off on parole  
11 than he would be when he was in prison.

12 MR. LONG: But, Your Honor, that's not the  
13 way this Court has analyzed the fourth-amendment  
14 issues. It's a different situation. It is conditional  
15 liberty. It's the -- that sort of active grace theory,  
16 or right, privilege, distinction, or greater power  
17 includes the lesser, all those arguments have been  
18 rejected, in --

19 JUSTICE SCALIA: Are --

20 MR. LONG: -- Morrissey against Brewer, and  
21 Gagnon --

22 JUSTICE SOUTER: What --

23 MR. LONG: -- against Scarpelli.

24 JUSTICE SCALIA: Not --

25 JUSTICE SOUTER: -- what do you make of --

1 JUSTICE SCALIA: -- by me. No, go ahead.

2 MR. LONG: It's --

3 JUSTICE SOUTER: I was going to say, What do  
4 you make of the pragmatic argument that seems to cut  
5 all of your objections? The pragmatic argument is both  
6 in favor of complete discretion and of suspicionless  
7 search, that the in terrorem effect of knowing that  
8 these searches can occur at any moment, in fact,  
9 discourages recidivism.

10 MR. LONG: Well --

11 JUSTICE SOUTER: What's your response to  
12 that?

13 MR. LONG: -- I have a pragmatic argument,  
14 and then I have an argument just based on the fourth  
15 amendment. Pragmatically, no other State, as far as we  
16 can tell, and not the Federal Government, authorizes  
17 this kind of search; that is, blanket suspicionless  
18 discretionary searches by police officers.

19 JUSTICE SOUTER: Apart from --

20 MR. LONG: So --

21 JUSTICE SOUTER: Apart from the lack of  
22 popularity of the State's view, do --

23 MR. LONG: Well --

24 JUSTICE SOUTER: -- do we have -- do we have  
25 any empirical evidence that bears on the in terrorem



1 argument?

2 MR. LONG: The -- well, the empirical  
3 evidence is that all the other States don't seem to be  
4 having a harder time --

5 JUSTICE SOUTER: No, I --

6 MR. LONG: -- with recidivism.

7 JUSTICE SOUTER: -- I realize that. But,  
8 beyond that, do we have any empirical evidence, one way  
9 or the other?

10 MR. LONG: Well, the California -- I think  
11 that's a pretty powerful demonstration, but we do have,  
12 beyond that, empirically, California was with all the  
13 other States until the People against Reyes decision.  
14 Now they've moved to suspicionless searches. They seem  
15 to have about the same rate of recidivism --

16 JUSTICE SOUTER: I take it --

17 MR. LONG: -- as they --

18 JUSTICE SOUTER: -- the answer is --

19 MR. LONG: -- did before.

20 JUSTICE SOUTER: -- we don't have any  
21 empirical evidence, one way or the other, apart from  
22 the fact that California stands out in its system. Is  
23 that correct?

24 MR. LONG: Well, I -- I'm -- think I'm  
25 offering you evidence that counts as empirical in my

1 mind, but --

2 JUSTICE SOUTER: No, I --

3 MR. LONG: -- apparently it's not --

4 JUSTICE SOUTER: -- I know it, but I've said,  
5 about three times, that I want to get beyond the  
6 peculiar position of California to any other empirical  
7 evidence that cuts for you or against you. And I take  
8 it there really isn't --

9 MR. LONG: Well, there -- we have a footnote.

10 There is a brief submitted by a Stanford law  
11 professor, and we have at least a footnote in our  
12 brief. There is some social-science research that  
13 suggests that this more intensive supervision is really  
14 not effective, if you look at broad numbers. I mean, I  
15 think you will catch some additional people. I mean,  
16 it happened in this case. But if you step back and  
17 look at the overall effects, it's not -- it's not  
18 particularly helpful --

19 JUSTICE BREYER: Why --

20 CHIEF JUSTICE ROBERTS: Well --

21 JUSTICE BREYER: Why, if we're going to catch  
22 some additional people, is that not sufficient? That  
23 is, why is it unreasonable, say, not for law  
24 professors, but business-school professors, management  
25 consultants, to say, "You have a lot of prisoners in

1 California, hundreds of thousands -- I don't know,  
2 maybe more than 100,000 -- and we'll tell the  
3 Legislature that they can cut the terms, save money,  
4 release them early, but we want to have management  
5 checks. And the management checks are, you might be  
6 searched at any time. And we catch a few. And that's  
7 helpful." Now, if the --

8 MR. LONG: Well --

9 JUSTICE BREYER: -- State decides that,  
10 what's unreasonable about it? "They're" --

11 MR. LONG: Well --

12 JUSTICE BREYER: -- "letting the people out  
13 earlier than they otherwise would" --

14 MR. LONG: Because --

15 JUSTICE BREYER: -- says the Legislature.

16 MR. LONG: Because, Justice Breyer, it has to  
17 be a balancing analysis, and --

18 JUSTICE BREYER: And what's on the other  
19 side? The other side --

20 MR. LONG: Well --

21 JUSTICE BREYER: -- is, you'd rather not have  
22 policemen search you, but your alternative is going to  
23 be in jail.

24 MR. LONG: Well, I mean, the other side is a  
25 search condition that says you have -- you could be

1 searched at any time, any place, by any police officer  
2 for evidence of any crime, is a breathtakingly broad  
3 invasion of privacy.

4 JUSTICE BREYER: But, of course, that's how  
5 it happens when he's in prison.

6 MR. LONG: Well, but he has come out of  
7 prison. The State has seen fit to release him on  
8 parole into society. He has conditional liberty. And  
9 the Court --

10 JUSTICE SCALIA: But there is a  
11 breathtakingly high probability that he is committing a  
12 crime. The statistics cited in the Government's brief  
13 say that in an April 2001 report prepared by the  
14 California Criminal Justice Statistics Center, 68  
15 percent of adult parolees are returned to prison -- 68  
16 percent; 55 percent, for a parole violation; and 13  
17 percent for the commission of a new felony offense. I  
18 mean, it seems to me a breathtaking statistic like that  
19 may call for breathtaking --

20 MR. LONG: Yes.

21 JUSTICE SCALIA: -- measures to try to police  
22 the matter closely.

23 MR. LONG: It is a very serious problem. We  
24 don't want to minimize it. I mean, it is a fact that  
25 many -- many parolees -- and this is true especially in

1 California -- end up being returned for technical  
2 violations, like not showing up to meetings with parole  
3 officers. Some of the offenses are not as serious as  
4 others. But it is a very serious problem. We  
5 recognize that. But what the Court has said is that  
6 the gravity of the problem cannot justify any means.  
7 There has to be a balancing of the invasion of privacy  
8 against the State's need to undertake this.

9 And coming back to my second answer to the  
10 question you asked several minutes ago, Justice Scalia,  
11 I mean, ultimately this search is a -- it's a general  
12 warrant. It's a writ of assistance. It's limited to  
13 parolees, but if the Court is going to stand by what it  
14 has said in Griffin and other cases, that their  
15 parolees and probationers have some modicum of fourth-  
16 amendment rights -- reduced, we recognize that -- this  
17 is -- this is the core of what the --

18 CHIEF JUSTICE ROBERTS: Well, the --

19 MR. LONG: -- framers of --

20 CHIEF JUSTICE ROBERTS: -- California --

21 MR. LONG: -- the fourth amendment  
22 prohibited.

23 CHIEF JUSTICE ROBERTS: The California  
24 Supreme Court said that the fourth amendment applied to  
25 these searches, but it only protected in a limited way,

1 along the same lines as we said in Griffin. And the  
2 standard they applied was, it protected against  
3 arbitrary or harassing or capricious searches --

4 MR. LONG: Yes, but --

5 CHIEF JUSTICE ROBERTS: -- which seems to go  
6 to your argument, which is centered around the  
7 unbridled discretion of the officer. And the  
8 California Supreme Court is saying it's not unbridled.

9 MR. LONG: That is their answer to my  
10 argument, and I want to be very clear about "arbitrary,  
11 capricious, and harassing." That's the California  
12 Supreme Court's standard. So, of course, they get to  
13 define it. And they have not defined it the way this  
14 Court perhaps would define "arbitrary." It's not  
15 arbitrary, capricious, or harassing if it has a  
16 permissible law enforcement purpose. So, as long as  
17 the officer says, "Well, I don't have any reason to  
18 think there's evidence of any crime here, but that's  
19 what I'm looking for. Perhaps there's evidence of  
20 crime" --

21 CHIEF JUSTICE ROBERTS: Well, that's --

22 MR. LONG: -- that's enough.

23 CHIEF JUSTICE ROBERTS: -- fine. But it  
24 turns out he stops the guy every hour of the day, then  
25 he has a pretty strong case that this is for

1 harassment, and it's not --

2 MR. LONG: Well --

3 CHIEF JUSTICE ROBERTS: -- for the special  
4 law enforcement --

5 MR. LONG: Well, and --

6 CHIEF JUSTICE ROBERTS: -- need that  
7 accompanies releasing parolees.

8 MR. LONG: And I take it the fourth amendment  
9 itself would prohibit that sort of thing. But it --  
10 you couldn't -- you couldn't justify a general warrant  
11 by saying, "Well, yes, the officer can search anybody,  
12 without any suspicion, and he can choose." But it --  
13 you know, the search can't happen too often, or it  
14 can't last too long. That would not be -- and you --  
15 and you -- similarly, it would not be an answer to say,  
16 "Well, as long as he's looking for evidence of crime."

17 CHIEF JUSTICE ROBERTS: No, but your point  
18 was that this is the core of the fourth amendment, and  
19 they're taking away all of the protection and leaving  
20 it to the unbridled discretion. And that turns out to  
21 be not the case. Under the law that authorizes the  
22 procedure, the California Supreme Court interpretation  
23 is that the fourth amendment provides protection  
24 against harassment or arbitrary and --

25 MR. LONG: Well --

1 CHIEF JUSTICE ROBERTS: -- capricious  
2 searches.

3 MR. LONG: -- I mean, my argument is that  
4 what is left of the fourth amendment under the  
5 California approach is not the core. It's the far  
6 periphery. There has never been a case -- and we were  
7 able to find over a hundred, and perhaps over 200; it  
8 depends on how you count -- of cases where parolees or  
9 probationers have said, "You know, this search was  
10 arbitrary or capricious or harassing." It is always  
11 rejected, for the same reason it was in this case. The  
12 Court says, "Well" --

13 CHIEF JUSTICE ROBERTS: Then which way do you  
14 think that cuts? There's --

15 MR. LONG: It --

16 CHIEF JUSTICE ROBERTS: -- never been a case  
17 of a harassing search of a parolee.

18 MR. LONG: I --

19 CHIEF JUSTICE ROBERTS: I mean, that's what -  
20 - or 200 cases in the --

21 MR. LONG: I --

22 CHIEF JUSTICE ROBERTS: -- in --

23 MR. LONG: -- I think it cuts in the  
24 direction that it is an empty, vacuous standard. It's  
25 a standard --



1 JUSTICE GINSBURG: Why?

2 MR. LONG: -- that's always --

3 JUSTICE GINSBURG: Why? If it -- if it -- if

4 it -- it doesn't go to the suspicionless character of

5 the search, but it does say it has to be reasonable in

6 time, place, or manner.

7 MR. LONG: Yes.

8 JUSTICE GINSBURG: And maybe the --

9 MR. LONG: Yes.

10 JUSTICE GINSBURG: -- officers are reasonable

11 in time, place --

12 MR. LONG: Yes.

13 JUSTICE GINSBURG: -- or manner.

14 MR. LONG: And -- but it's -- it had -- there

15 has never been a case in which a court has rejected a

16 parolee search as unreasonable in time, place, or

17 manner. And you could --

18 JUSTICE GINSBURG: How many times has it been

19 challenged --

20 MR. LONG: As --

21 JUSTICE GINSBURG: -- on the --

22 MR. LONG: -- we said --

23 JUSTICE GINSBURG: -- on the --

24 MR. LONG: -- at -- we found over a hundred

25 cases in which it's been challenged in the California

1 courts. And it --

2 JUSTICE ALITO: Well --

3 MR. LONG: I mean, if you think about it, if  
4 the search is, say, at night, the argument is going to  
5 be -- well, if we said we'd not -- "never going to  
6 search you at night," then you would commit crimes at  
7 night. We had a very extreme case in our brief about  
8 body-cavity searches. And they said, "Well, that -- of  
9 course, that" -- you know, the suggestion was, "Of  
10 course, that would be too extreme." But you could see  
11 an argument if parolees and probationers knew that that  
12 was off limits, that -- you know, that would become a -  
13 -

14 JUSTICE SCALIA: You say there was a case in  
15 which, without any special reason, they did --

16 MR. LONG: No. Let --

17 JUSTICE SCALIA: -- a cavity --

18 MR. LONG: No.

19 JUSTICE SCALIA: And that would --

20 MR. LONG: Let me be --

21 JUSTICE SCALIA: Oh, okay.

22 MR. LONG: I am not aware of any actual case.

23 We posited that. We said -- you know, because you  
24 don't need to know anything about the parolee, except  
25 he's on parole, and you can search for evidence of any

1 crime. You don't need any suspicion that -- so, you  
2 could have somebody, a sort of white-collar criminal,  
3 or you'd check someone who's written a bad check. And  
4 if you say, "Well, I think perhaps you're involved in  
5 drugs. Maybe you're one of these balloon-swallowers" -  
6 - you don't need any actual reason to think that's  
7 happening, you can simply say, "I want to investigate  
8 that." And the way -- you have to investigate by X  
9 rays or something else quite intrusive.

10 JUSTICE SCALIA: The California Supreme Court  
11 may -- might well hold that it's arbitrary to conduct  
12 such an extreme search as a body-cavity search, or to -  
13 - I don't know --

14 MR. LONG: Well --

15 JUSTICE SCALIA: -- to decide to search the  
16 person when he's in the men's room or something. I  
17 mean, there are --

18 MR. LONG: But --

19 JUSTICE SCALIA: -- there are a lot of  
20 limitations that the California court --

21 MR. LONG: They might, and --

22 JUSTICE SCALIA: -- could put on it, within  
23 the context of harassment or --

24 MR. LONG: But our principal submission,  
25 Justice Scalia -- I mean, if California said, "We have

1 a terrible problem with crime in California; and,  
2 therefore, we're authorizing every police officer to  
3 search every person anytime, anywhere, for any crime,"  
4 that would be, I would submit, the clearest sort of  
5 fourth-amendment violation you could imagine. It would  
6 be a general warrant or a writ of assistance. It  
7 couldn't possibly be justified by saying, "Well, if it  
8 gets too extreme, if it gets into body-cavity searches,  
9 we won't allow it." We are talking about parolees,  
10 yes. Their fourth-amendment rights are reduced, yes.  
11 We recognize that. But saying that this sort of  
12 absolutely unguided discretion --

13 JUSTICE BREYER: But the reason ---

14 MR. LONG: -- there's no sort of --

15 JUSTICE BREYER: -- the reason that people, I  
16 think, are saying that is because they have a lot of  
17 prisoners, they're trying to create a category of  
18 people who don't have to stay in prison, where they  
19 have no rights. And the real question is, Can  
20 California, in trying to create this interim category,  
21 reduce the fourth-amendment right in the way you  
22 describe?

23 MR. LONG: They --

24 JUSTICE BREYER: Of course they can't do it,  
25 but the justification is not that there is something

1 bad about this particular individual or he's in some  
2 kind of limbo. The reason is that there's a policy  
3 tending towards release, which California has decided  
4 they want to introduce this as a condition. Now --

5 MR. LONG: Yes.

6 JUSTICE BREYER: -- and so, what -- and the  
7 question is, What's unreasonable about that?

8 MR. LONG: Well, what's unreasonable about it  
9 is that it goes so far in the direction of eliminating  
10 the fourth-amendment rights of people who are not  
11 prisoners -- they are -- they have conditional liberty  
12 -- that it is simply not consistent with the fourth-  
13 amendment. And on the empirical side, California is an  
14 outlier. All the other States --

15 JUSTICE STEVENS: May I -- may I ask you --

16 MR. LONG: -- and the Federal Government --

17 JUSTICE STEVENS: -- this question? Part of  
18 your appeal of your case is, you talk about the  
19 corporate offender or tax dodger, something like that.

20 It seems quite unreasonable, I agree with you. But  
21 what if you defined the class much more narrowly and  
22 limit it to people who have been convicted of violent  
23 crimes of a very serious nature and so forth, and said,  
24 as to those, they can have the totally suspicionless  
25 search? Would that --

1 MR. LONG: Well --

2 JUSTICE STEVENS: -- be possible?

3 MR. LONG: -- I -- one of the things we

4 wanted to make -- I think there are many things that

5 States can do. They could certainly --

6 JUSTICE STEVENS: But I wonder whether --

7 MR. LONG: -- there's the possibility of --

8 JUSTICE STEVENS: -- whether you think they

9 could do that.

10 MR. LONG: There's the possibility of

11 individual determinations, based on the individual

12 circumstances. If you went --

13 JUSTICE STEVENS: Well, what I'm --

14 MR. LONG: -- category by --

15 JUSTICE STEVENS: I want to see if there is a

16 way that the class could be defined narrowly, because I

17 want to ask the other side if they would allow the

18 search for any ex-felon, for example. You could write

19 it in a way that seemed obviously too broad. But is --

20 MR. LONG: Right.

21 JUSTICE STEVENS: -- there a narrower class -

22 -

23 MR. LONG: Well --

24 JUSTICE STEVENS: -- that you think would be

25 acceptable?

1           MR. LONG: I think this could be much  
2 narrower. And, in my view, it would become a much  
3 closer constitutional question if it were limited to  
4 certain crimes where the legislature or the State made  
5 a finding that there's a particular need to have --

6           JUSTICE STEVENS: Say you were a --

7           MR. LONG: -- suspicionless --

8           JUSTICE STEVENS: -- terrorist, for example.

9           MR. LONG: And --

10          JUSTICE STEVENS: Just limit it to  
11 terrorists, convicted terrorists.

12          MR. LONG: Yes, perhaps convicted terrorists.  
13 You know, that -- and it -- that's very different from  
14 what we have here, because --

15          JUSTICE GINSBURG: What about drug offenders,  
16 given the high rate of recidivism?

17          MR. LONG: Well, I -- you know, we -- I think  
18 you would have to see the facts of that case, but if  
19 they made a finding that, "Because of the nature of  
20 drug offenses, we need suspicionless searches rather  
21 than simply reasonable suspicion, and we need police  
22 officers, not parole officers" -- and there could be  
23 other regulations. The Federal regulations, we think,  
24 are a model, really. They have lots of limitations on  
25 --

1 JUSTICE SCALIA: Mr. Long, is it -- is it  
2 fair to compare California to other States? The  
3 assumption would have to be that other States grant  
4 parole as liberally as California does. Maybe  
5 California has made the decision, "We have too many  
6 people in prison. We're going to let a lot of them  
7 out, but we're going to keep them on a very tight  
8 leash." Why shouldn't it be able to do that? -- to  
9 have tighter controls, but let out many more people on  
10 parole, which is -- which is exactly what I think  
11 they're doing.

12 MR. LONG: Well, and I -- I think they can  
13 have tighter controls, Your Honor. They can -- they  
14 can have -- they could have -- they could make this a  
15 special condition of parole --

16 JUSTICE SCALIA: But my only --

17 MR. LONG: -- rather than a general condition  
18 --

19 JUSTICE SCALIA: -- point is --

20 MR. LONG: -- of parole.

21 JUSTICE SCALIA: -- the fact that other  
22 States aren't as tight doesn't prove anything, because  
23 other States --

24 MR. LONG: Well --

25 JUSTICE SCALIA: -- may not be --



1 MR. LONG: Well --

2 JUSTICE SCALIA: -- be trying to do the same  
3 thing --

4 MR. LONG: I mean --

5 JUSTICE SCALIA: -- to empty their prisons --

6 MR. LONG: This Court has said, generally,  
7 that what the Court has found to be reasonable for one  
8 State is reasonable for all. And when a practice is  
9 not well established -- and here, it's far from well  
10 established; California's virtually unique -- the Court  
11 has taken that into account for --

12 JUSTICE GINSBURG: Suppose you were in a  
13 halfway house, and the State says, "We're creating a  
14 status. One is, you're a prisoner. Another is, you're  
15 a halfway house. Another is, on your -- parole. But  
16 we want to subject you to suspicionless searches at --  
17 in all three stages -- prison, halfway house, parole."  
18 Could they do it for the halfway house?

19 MR. LONG: Well, they might -- halfway  
20 houses, as I understand it, Justice Ginsburg, are  
21 largely now a thing of the past. But if the idea is  
22 you would actually be in a custody situation at night,  
23 perhaps in lockdown, then perhaps Hudson against Palmer  
24 would come into play --

25 JUSTICE GINSBURG: This person goes --

1 MR. LONG: -- which --

2 JUSTICE GINSBURG: -- out to work, comes back

3 at the end of the day, and is checked in.

4 MR. LONG: And so, your hypothetical is,

5 Could there be suspicionless searches by --

6 JUSTICE GINSBURG: Yeah, while the --

7 MR. LONG: -- police officers --

8 JUSTICE GINSBURG: -- while the --

9 MR. LONG: -- at work?

10 JUSTICE GINSBURG: The person who is in this

11 semi-custody state, he's going to work, and, while he's

12 at his workplace, the police officer shows up and says,

13 "I'm going to pat you down, and then I'm going to" --

14 MR. LONG: It's --

15 JUSTICE GINSBURG: -- "see if you have

16 drugs."

17 MR. LONG: It's a -- it's a harder case.

18 Again, our bottom line is, there would need to be some

19 limitations on that individual officer's discretion.

20 That's the core of the fourth amendment.

21 If there are no further questions, I'd like

22 to reserve the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

24 Mr. Niver, we'll hear now from you.

25 ORAL ARGUMENT OF RONALD E. NIVER

1                               ON BEHALF OF RESPONDENT

2                       MR. NIVER:  Mr. Chief Justice, and may it --  
3   may it please the Court:

4                       Alarmed by the State rate of recidivism and  
5   revocation of the more than 100,000 parolees,  
6   California enacted a statute which authorized the  
7   search of a parolee based solely on his status as a  
8   parolee.  We submit that such a search is reasonable  
9   under the fourth amendment.

10                      As this Court held recently in United States  
11   versus Knights, to determine the validity of the search  
12   we balance the State's need to search against the  
13   privacy interest affected.  Here, the need is  
14   overwhelming, and the privacy interest is dramatically  
15   reduced.

16                      Turning first to Petitioner's expectation of  
17   privacy, it is greatly diminished.  Even if it exists,  
18   it is far less than that enjoyed by the average law-  
19   abiding citizen.  No one outside the confines of a  
20   prison has a lesser expectation of privacy than a  
21   parolee.

22                      CHIEF JUSTICE ROBERTS:  Why is that?  Doesn't  
23   that kind of beg the question?  I mean, if we say he's  
24   got the normal fourth-amendment rights, his -- I mean,  
25   the expectation-of-privacy analysis seems to me to be

1       totally circular.

2               MR. NIVER:   That's what the --

3               CHIEF JUSTICE ROBERTS:   You say he doesn't  
4       have an expectation of privacy, so it's not protected.

5       Well, if we say he does have a -- if we say it is  
6       protected, then he does have an expectation of privacy.

7               MR. NIVER:   Well, this Court spoke to that in  
8       Knights and said, unanimously that the -- in Knights,  
9       it was a probation condition, but I think that it --  
10      obviously, the same analysis applies here -- that the  
11      imposition or acceptance of a -- of a search condition  
12      by a parolee or a probationer results in the severely  
13      diminished expectation of privacy enjoyed by the  
14      parolee or probationer.   And this Court said that  
15      unanimously in Knights.

16              CHIEF JUSTICE ROBERTS:   Well, Knights  
17      involved a situation where reasonable suspicion was  
18      required, so it addressed the problem that Mr. Long has  
19      of unbridled discretion.   You still had to have an  
20      articulable reasonable suspicion with respect to the  
21      individual.

22              MR. NIVER:   That is true, Your Honor, but the  
23      threshold question was whether he had an expectation of  
24      privacy at all, or to the -- the extent of that  
25      expectation of privacy.   And the Court, in Knights,

1 before it discussed the balance, had to identify the  
2 factors in the balance. In terms of the probationer's  
3 interest in that case, by virtue of the search  
4 condition, this Court said that his interest in -- his  
5 expectation of privacy was severely diminished, and  
6 left open --

7 CHIEF JUSTICE ROBERTS: Why -- and why was  
8 his expectation of privacy severely diminished?

9 MR. NIVER: Because of the parole's -- excuse  
10 me -- the probation search that was imposed upon him by  
11 virtue of the --

12 CHIEF JUSTICE ROBERTS: Because of the very  
13 practice that's being challenged here today, right?

14 MR. NIVER: Well, yes.

15 CHIEF JUSTICE ROBERTS: Because he saw  
16 something -- you -- he signed something that said,  
17 "You're subject to searches." Well, that's what is at  
18 issue. It seems to me that it's -- I guess I've said  
19 it before, he's -- it's begging the question to say,  
20 "You can do this, because he has a diminished  
21 expectation of privacy." How far do you push this?  
22 Can you have parolees come in and take a lie-detector  
23 test every week? Do they have -- do they have  
24 diminished expectation with respect to their fifth-  
25 amendment rights?

1           MR. NIVER: With regard to the fifth-  
2   amendment rights, if they are not in custody, then --  
3   or even if they are -- I don't think that that would  
4   necessarily -- the -- any expectation of privacy would  
5   preclude the imposition of a lie-detector test, no.

6           CHIEF JUSTICE ROBERTS: Was that a yes, you  
7   can have them --

8           MR. NIVER: Yes, Your Honor.

9           CHIEF JUSTICE ROBERTS: You can.

10          MR. NIVER: Yes. But in this case, the --

11          JUSTICE SCALIA: Is --

12          CHIEF JUSTICE ROBERTS: What about --

13          JUSTICE SCALIA: Is --

14          CHIEF JUSTICE ROBERTS: What about --

15          JUSTICE SCALIA: Is that right? I mean, even  
16   in prison, I -- what -- I'm not sure you could even do  
17   that if they were still in prison. Can you subject  
18   people in prison --

19          MR. NIVER: Well, of course, that would not  
20   be a fourth-amendment claim.

21          JUSTICE SCALIA: No. No, I --

22          MR. NIVER: It would be a different --

23          JUSTICE SCALIA: The Chief Justice was trying  
24   to get out of the fourth amendment into the fifth.

25          MR. NIVER: That failing -- well, in terms of

1 the lack of a precedent from this Court, you know, at  
2 this point we can only speculate, but it seems to me  
3 that if a person can be required to submit to a drug  
4 test by virtue of the status as a parolee or  
5 probationer, I don't think that it is an extravagant  
6 step to say that they could be required to submit to an  
7 --

8 JUSTICE STEVENS: Would you say the same  
9 thing if the offense he had committed was tax evasion  
10 or price-fixing or speeding? Would the -- would a  
11 person on parole for any one of those offenses have --  
12 be subject to the same risk of a suspicionless search?  
13 And would it be justified?

14 MR. NIVER: Suspicionless search?

15 JUSTICE STEVENS: Well --

16 MR. NIVER: Where we're back to --

17 JUSTICE STEVENS: -- applying this statute to  
18 --

19 MR. NIVER: Yes.

20 JUSTICE STEVENS: -- a price-fixer, tax-  
21 evader, speeder. Do you think it's justified?

22 MR. NIVER: If he's on parole, Your Honor, if  
23 he's -- look, this applies to parolees in California  
24 who have been convicted of felonies, served time in  
25 prison, and have been --

1 JUSTICE STEVENS: And if it's to be --  
2 MR. NIVER: -- released on parole.  
3 JUSTICE STEVENS: -- applied to the tax  
4 offender and so forth, how about just applying it to  
5 all ex-felons? Would that be permissible?  
6 MR. NIVER: On parole, or not on --  
7 JUSTICE STEVENS: No, just the very fact that  
8 there's -- they're an ex-felon. And let the person  
9 know, at the time of his discharge from prison, that,  
10 "This is one of the things that the State is going to  
11 exact from you as punishment for your crime."  
12 MR. NIVER: If the person is on parole, the  
13 answer --  
14 JUSTICE STEVENS: No, I'm saying --  
15 MR. NIVER: Oh --  
16 JUSTICE STEVENS: -- he's not on parole.  
17 MR. NIVER: -- he's no longer on parole?  
18 Than the entire balance changes. The reduction of the  
19 expectation of privacy --  
20 JUSTICE STEVENS: But I'm hypothesizing a  
21 case in which the law will destroy the expectation of  
22 privacy, because it will provide that all ex-felons are  
23 subject to search. So, they would know, the same as a  
24 parolee now knows, he's subject to search. Would that  
25 be valid?



1           MR. NIVER: My answer to that is, it would  
2 not be valid, Your Honor, because a person, having  
3 served his time on parole, the State's overwhelming  
4 interest in supervision has ended. The State has  
5 determined that that person, having successfully  
6 completed his period of parole --

7           JUSTICE STEVENS: But -- so you don't --

8           JUSTICE SCALIA: Most --

9           JUSTICE STEVENS: -- rely on --

10          JUSTICE SCALIA: Most States --

11          JUSTICE STEVENS: -- the fact that --

12          JUSTICE SCALIA: -- don't let felons vote. I  
13 mean, that's a punishment that they impose after  
14 they're out of prison.

15          MR. NIVER: Yes, but this is not -- yes, Your  
16 Honor, but this is really not about punishment, this is  
17 about supervision. And if a parolee has successfully  
18 completed this parole, has been discharged from parole,  
19 then the balance --

20          JUSTICE STEVENS: But then we're not relying  
21 on the elimination of the expectation of privacy,  
22 because, under my hypothetical statute, the ex-felon  
23 would know he's subject to it. So, it has to be  
24 something other than the absence of an expectation of  
25 privacy. Is that correct?

1           MR. NIVER: Not -- a person who is no longer  
2 on parole, there is no longer the overwhelming State  
3 interest in supervision. The balance changes. Our  
4 position would be that that would not be a permissible  
5 search.

6           JUSTICE SCALIA: It seems to me that the  
7 principal difference, Mr. Niver, is that when he's on  
8 parole, it's in lieu of being in jail. If that's not  
9 the difference, you don't persuade me. He has  
10 voluntarily accepted the parole in exchange for his  
11 getting out of jail. And he'd be in worse condition if  
12 he were in jail. That's what, seems to me, makes the  
13 difference.

14          MR. NIVER: Well, that's -- I think that's  
15 exactly right, Your Honor. The ex-parolee, no longer  
16 on parole, is no longer in custody of the -- of the  
17 California Department of Corrections, there is no  
18 longer an overwhelming need to supervise the person,  
19 who, having successfully completed parole, is  
20 presumptively not the threat to society that he was  
21 that he -- when he was a parolee. The balance changes,  
22 and such a condition -- that is to say a suspicionless  
23 search of an ex-parolee -- I think would offend the  
24 fourth amendment.

25          JUSTICE GINSBURG: Mr. Niver --

1 JUSTICE BREYER: But what do you achieve by  
2 this system that you have that you couldn't achieve by  
3 a system that more carefully worked out the rules and  
4 conditions of a random search? I mean, rules, so that  
5 you avoid the totally discretionary element. And if  
6 you want to have management consultants, as I was  
7 imagining, have 'em. They're not just going to tell  
8 you, "Go and ask anybody to search anytime he wants."  
9 They'll have a system worked out. So, why not at least  
10 require you to think it through that much? And,  
11 otherwise, it is unreasonable.

12 MR. NIVER: Well, we have disputed  
13 Petitioner's position that this is a search, although  
14 suspicionless, that it is -- that discretion is not  
15 circumscribed is our position. And it is, because --

16 JUSTICE GINSBURG: Well, are there manuals --  
17 are there any -- here is the cop on the beat.

18 MR. NIVER: Yes.

19 JUSTICE GINSBURG: He sees someone that he  
20 knows is a parolee. Is there any instruction that he's  
21 been given so that his discretion can be guided instead  
22 of rudderless? In practice in California, are all --

23 MR. NIVER: In -- I'm sorry, Your Honor.

24 JUSTICE GINSBURG: Yes. What is the  
25 practice?

1           MR. NIVER: In practice, the -- a search -- a  
2 parole search may not be arbitrary, capricious, or  
3 conducted solely for the purpose of harassing --

4           JUSTICE GINSBURG: I'm asking you about what  
5 instruction, what training, if you know, are officers  
6 given? Or are they given no training, just the law  
7 that says, "You can search any parolee"?

8           MR. NIVER: No, they are not told that they  
9 may search any parolee, Your Honor. Rather, they are  
10 told that the search must be to rehabilitate, reform,  
11 or have some other law enforcement purpose. And they -  
12 -

13          JUSTICE SOUTER: Okay. The officer says,  
14 "I'm searching to see whether the person has any  
15 evidence of crime on him." For example, whether he has  
16 any drugs on him. Law enforcement purpose:  
17 supervisory, I suppose. They want to know whether  
18 their -- whether their parolees are committing  
19 offenses. And yet, that reason would apply to everyone  
20 virtually all the time. So, it doesn't seem to be a  
21 limitation at all. What -- am I -- am I missing  
22 something?

23          MR. NIVER: It does apply -- it is a  
24 limitation. It is not a limitation that would protect  
25 the expectation of privacy of a nonparole --

1 JUSTICE SOUTER: Well, how does the  
2 limitation work? The guy is on 1st Street, and an  
3 officer says, you know, "I recognize this person is a  
4 parolee, and I have a law enforcement objective. Is  
5 the person committing a crime? Is the -- is the person  
6 a recidivist? Is the person violating parole?" So, he  
7 searches him. The person gets to 2nd Street, another  
8 officer does the same thing. Three hours later, a  
9 third officer does the same thing. In each case, it  
10 seems to me, their justification would not fall afoul  
11 of the arbitrary, capricious, or harassment standard.  
12 It's not coordinated. They have a -- both a parole  
13 and a law enforcement objective. Why is there any  
14 limitation, then, on the right to search?

15 MR. NIVER: If these are, as I understand  
16 Your Honor's hypothetical, three independent searches -  
17 -

18 JUSTICE SOUTER: Uh-huh.

19 MR. NIVER: -- to the extent that that could  
20 happen, and I suppose it could, the -- again, the  
21 limitation is that it be, as Your Honor states, for a  
22 valid law enforcement purpose, and it would require --

23 JUSTICE SOUTER: No. No, but let's get  
24 behind the rhetoric. Is there any reason my  
25 hypothetical could not, in fact, turn out to be true?

1 MR. NIVER: There is no --

2 JUSTICE SOUTER: Apart from the unlikelihood  
3 of all those police officers out there. But, leaving  
4 that aside, is there -- is there any reason, in the  
5 standard, that my hypothetical could not be true?

6 MR. NIVER: Well, Your Honor, no, there is no  
7 reason, but it would -- it requires more than testimony  
8 by the officers. If the officers at -- each testified  
9 that they conducted the search, they're -- also  
10 requires a finding of fact by the trial court that the  
11 searches were, in fact, for a valid law enforcement  
12 purpose.

13 JUSTICE SOUTER: Okay. I mean, let's assume  
14 the police are telling the truth, and the judge says,  
15 "Sure." So, there is no limitation. And it sounds to  
16 me, then, as though about the only limitation that  
17 would be enforceable would be the limitation against  
18 harassment. If one officer did it every 15 minutes to  
19 the same person, or if there were a departmental  
20 systematic policy saying, you know, "Get so-and-so,"  
21 that I can understand as being a limitation. But I  
22 don't see any other limit.

23 MR. NIVER: Well, the limitation is, as Your  
24 Honor states, if it's a -- for a valid law enforcement  
25 purpose or to promote rehabilitation or --

1 JUSTICE SOUTER: No, I realize --  
2 MR. NIVER: -- recommend --  
3 JUSTICE SOUTER: -- but do you --  
4 MR. NIVER: But --  
5 JUSTICE SOUTER: -- do you agree that there  
6 is not any practical limitation, other than the  
7 harassment limitation?  
8 MR. NIVER: I -- well, that harassment  
9 limitation is sufficient to protect the residuum of an  
10 expectation --  
11 JUSTICE SOUTER: Well, maybe --  
12 MR. NIVER: -- of --  
13 JUSTICE SOUTER: -- maybe it is. But what's  
14 the answer to my question? Is that, in practical  
15 terms, the only limitation?  
16 MR. NIVER: It is a -- but it -- yes, Your  
17 Honor, that is the protection.  
18 JUSTICE SOUTER: Okay.  
19 JUSTICE SCALIA: I thought you said that  
20 maybe cavity searches would not -- would not be allowed  
21 without some special reason for them. And that  
22 wouldn't necessarily be harassment.  
23 MR. NIVER: I think it depends on the  
24 circumstances of the search.  
25 JUSTICE SCALIA: Yes --

1 MR. NIVER: There's an --

2 JUSTICE SCALIA: I mean --

3 MR. NIVER: -- overarching principle here,  
4 under the fourth amendment, that the search be  
5 reasonable, in terms of manner and scope.

6 JUSTICE SCALIA: Okay.

7 MR. NIVER: That applies equally to a  
8 suspicionless search as it would to a search based on  
9 individual suspicion. To that extent, it's really not  
10 an issue that arises from the fact that this is  
11 suspicionless.

12 JUSTICE GINSBURG: What would be arbitrary  
13 and capricious? You told us harassing would be the  
14 repeated searches by the same officer.

15 MR. NIVER: Or an --

16 JUSTICE GINSBURG: What --

17 MR. NIVER: Or a needlessly intrusive search,  
18 as has been just described, or --

19 JUSTICE SOUTER: Well, let's assume -- let's  
20 assume that the cavity search is demanded at the bus  
21 station, and the officer says, "We know that drugs get  
22 transported by people who ingest them in the balloons,  
23 and they get on buses and they travel back and forth  
24 from city A to city B." Any reason that that would run  
25 afoul of arbitrary and capricious?



1           MR. NIVER: Depends on the circumstances of  
2 the search. Again, Your Honor --

3           JUSTICE SOUTER: All I'm telling you is, he's  
4 at a bus station. The facts are that a lot of people  
5 who travel on buses are drug couriers. This person is  
6 a parolee. Would that run afoul of the -- of any  
7 arbitrary and capricious limitation?

8           MR. NIVER: It would, for example, if it were  
9 done in public view. If the officer didn't, then --

10          JUSTICE SOUTER: Well, sure, but the officer  
11 says, "All right. I'm taking you down to the station  
12 for a cavity search."

13          MR. NIVER: Again, the office -- if the  
14 officer did it under those circumstances, it's for the  
15 finder of fact to decide whether it was done for a  
16 legitimate purpose or --

17          JUSTICE SOUTER: Well, you're -- I'm asking  
18 you to be the finder of fact for me. This is the  
19 officer's explanation. This is the factual -- set of  
20 factual premises on which he acts. Has he violated the  
21 arbitrary and capricious limitation?

22          MR. NIVER: If, in fact, it was for the  
23 purpose that you state, a legitimate law enforcement  
24 purpose, and he has been removed from public view, and  
25 it's reasonable, in terms of manner and intensity, then

1 it would be permissible.

2 JUSTICE STEVENS: I have one --

3 JUSTICE SCALIA: Well, suppose you couldn't -

4 -

5 JUSTICE STEVENS: I have one --

6 JUSTICE SCALIA: -- you couldn't --

7 JUSTICE STEVENS: I have --

8 JUSTICE SCALIA: -- conduct cavity searches  
9 without some special reason, even in prison. Wouldn't  
10 that be -- isn't there some remnant of a fourth-  
11 amendment right in prison that you cannot subject, you  
12 know, the whole cellblock to cavity searches?

13 MR. NIVER: That would depend, Your Honor, on  
14 the prison, the prison regs, the State. I can't answer  
15 that question --

16 JUSTICE SOUTER: Well, I --

17 MR. NIVER: -- in --

18 JUSTICE SOUTER: -- I thought the assumption  
19 of your answer to my question a moment ago was that  
20 there was no such limitation, so far as California is  
21 concerned.

22 MR. NIVER: No, there is a limitation, in  
23 terms of manner and scope.

24 JUSTICE SOUTER: Well, sure. But we -- the  
25 manner, in this case, is, they take him down to the

1 station, so that they're not going through this in the  
2 middle of a crowded bus terminal. But the point of the  
3 question was, any parolee at a bus terminal could be  
4 subjected to this demand for search, and I thought your  
5 answer was, yes, he could be. And now, in response to  
6 Justice Scalia's question, you're saying, "Well, there  
7 may be some limitation." So, which is it?

8 MR. NIVER: That if the search is a -- for a  
9 valid law enforcement purpose, and it is reasonable in  
10 scope and manner, then it is a permissible parolee  
11 search, in California.

12 CHIEF JUSTICE ROBERTS: Does it depend -- I  
13 mean, what if he's on parole for transporting drugs in  
14 balloons from bus stations? Does that make a  
15 difference? -- as opposed to, he's on parole for tax  
16 fraud.

17 MR. NIVER: It certainly might, Your Honor.  
18 And, again, that would be -- that -- an additional bit  
19 of evidence to present -- to be presented to the  
20 suppression court to determine whether the scope of the  
21 search was reasonable.

22 JUSTICE GINSBURG: But all this is on a case  
23 -- would be on a case-by-case basis. There are no  
24 going-in guides for the officer on the street.

25 MR. NIVER: It's necessarily determined on

1 the -- any search has to be decided -- the  
2 reasonableness of any search has to be decided on a  
3 case-by-case basis.

4 JUSTICE SCALIA: Do we --

5 JUSTICE BREYER: But the reasonableness here  
6 would be unreasonable, unless there are some checks.  
7 We're talking about suspicionless searches. And you  
8 could have checks. But what about saying -- why is it  
9 reasonable to do it without any rule-based controls on  
10 the behavior of the police? That's the question.

11 MR. NIVER: Okay. And the answer is, in  
12 terms of the competing interests, the lowered  
13 expectations --

14 JUSTICE SOUTER: Okay. But what interest  
15 does it serve not to have some rules, manuals,  
16 regulations that help make sure it really is random, or  
17 help make sure it isn't harassing, or help make sure  
18 that it's serving the very ends that you hope to serve  
19 with the suspicionless searches?

20 MR. NIVER: If a State wishes to adopt such  
21 rules, those would -- may comply with the fourth  
22 amendment. The question is not, What could be done?  
23 The question is, What was done? The question is  
24 whether California's rule, which permits parolee  
25 searches that -- with the -- absolute prohibition of

1 arbitrary, capricious, and harassing suits, and which  
2 must be conducted under the fourth amendment, in terms  
3 -- reasonable, in terms of time, place, manner, and  
4 scope -- the question is whether that system, the  
5 California scheme, is constitutional under the fourth  
6 amendment. And here, the system was designed to  
7 address an overwhelming problem that the Court, this  
8 Court, has well defined. The -- over 100,000 parolees  
9 are on the street at any given time. Almost 90,000 of  
10 them will be revoked in any given period. They -- the  
11 California parolees require intense supervision. The  
12 statute, 3067, was enacted to permit that kind of  
13 intense supervision. And the protection afforded to  
14 the parolee, in terms of a requirement of a proper  
15 purpose --

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Niver.  
17 Mr. Marcus.

18 ORAL ARGUMENT OF JONATHAN L. MARCUS  
19 FOR THE UNITED STATES, AS AMICUS CURIAE,  
20 IN SUPPORT OF RESPONDENT

21 MR. MARCUS: Thank you. Mr. Chief Justice,  
22 and may it please the Court:

23 Concerned about the threat that parolees pose  
24 to public safety, the California Legislature, in 1996,  
25 authorized both police and parole officers to search

1       them without individualized suspicion. Whether  
2       evaluated under the special-needs doctrine applied in  
3       Griffin, or the totality-of-the-circumstances approach  
4       applied in Knights, the search of Petitioner in this  
5       case, pursuant to his search condition, was reasonable  
6       under the fourth amendment.

7               CHIEF JUSTICE ROBERTS: Do we have --

8               JUSTICE KENNEDY: But not the consent --

9               CHIEF JUSTICE ROBERTS: -- to decide --

10              JUSTICE KENNEDY: -- not the consent  
11       approach, I take it. I didn't get an opportunity to  
12       ask the counsel who argued just previously. Seemed to  
13       me that he argued consent when he answered Justice  
14       Stevens's question about the tax-evader. But he argued  
15       the overwhelming practical needs when he argued the  
16       rest of the case. And I thought I saw some tension in  
17       the argument there. And I take it the Government does  
18       not embrace the consent argument?

19              MR. MARCUS: No, we do embrace it. We -- but  
20       we briefed --

21              JUSTICE KENNEDY: But you --

22              MR. MARCUS: -- the --

23              JUSTICE KENNEDY: -- just --

24              MR. MARCUS: It --

25              JUSTICE KENNEDY: -- put it in number --

1 MR. MARCUS: We --

2 JUSTICE KENNEDY: -- you put it --

3 MR. MARCUS: We --

4 JUSTICE KENNEDY: -- in number three?

5 MR. MARCUS: Right. It --

6 JUSTICE KENNEDY: In --

7 MR. MARCUS: -- well, primarily -- for a  
8 couple of reasons. First, Your Honor, the California  
9 Supreme Court has not had a chance to interpret  
10 3067(a), you know, after the Reyes decision. They  
11 weren't interpreting it there. And so, they haven't  
12 had a chance to revisit their ruling that, as a matter  
13 of State law, it's not -- there's no consent when it  
14 comes to a parolee. And that's -- so, we thought maybe  
15 that would be a reason this Court, prudentially,  
16 wouldn't want to reach that issue.

17 And, secondly, the -- while the joint  
18 appendix contains a portion of the agreement that the  
19 Petitioner signed, it doesn't contain the whole content  
20 of the agreement. The appellate record doesn't contain  
21 the whole content of the agreement. So, we didn't --

22 JUSTICE KENNEDY: But in your view, if the  
23 consent was straightforward in the documents, would  
24 that be the strongest argument or the weakest argument?

25 MR. MARCUS: Well, I think --

1 JUSTICE KENNEDY: I mean, I take you'll win  
2 on any --

3 MR. MARCUS: We --

4 JUSTICE KENNEDY: -- argument --

5 MR. MARCUS: Right, we think all --

6 JUSTICE KENNEDY: -- you can take.

7 MR. MARCUS: -- we think all three arguments  
8 are strong. I don't think -- one isn't necessarily  
9 stronger than the other. And -- but -- and this Court  
10 -- but if the Court -- I mean, the Court certainly, at  
11 a minimum, can look at the statutes under California  
12 law, and can certainly conclude from the statutes that  
13 if a -- if some -- if an inmate doesn't sign the  
14 papers, he stays in prison until his sentence basically  
15 terminates. And then -- and then, at that point, when  
16 he's released, this -- another provision, Section  
17 3060.5, kicks in, and his parole -- his parole is  
18 revoked. And he eventually will -- he ultimately will  
19 serve his whole term of parole in prison, so that the  
20 Court can see by the statutes that it is, effectively,  
21 a choice, statutorily, that he -- someone who does not  
22 want to be on parole does not have -- does not have to  
23 sign the condition, and will never go on parole.

24 JUSTICE GINSBURG: Mr. Long seemed to have --  
25 tell us something different about that. It's -- they



1     had -- they must go out. He seemed to say they didn't  
2     have the choice of staying in.

3             MR. MARCUS: Well, I think it's fairly clear,  
4     Your Honor, under -- if you look at the appendix to the  
5     Petitioner's brief, if you -- if you look at a  
6     combination of Section 3067(b), and then -- which --

7             JUSTICE SCALIA: I think he said he was  
8     unaware of anybody who was dragged out kicking and  
9     screaming, if I --

10            MR. MARCUS: Right. And then --

11            JUSTICE SCALIA: -- recall his answer --

12            MR. MARCUS: -- and if you look at --

13            JUSTICE SCALIA: -- on that.

14            MR. MARCUS: -- 3067(b), and then you also  
15     look at -- 3067(a) and (b), and then you look at  
16     Section 3060.5, which provides for revocation if the --  
17     if the inmate is -- or the parolee is unwilling to --

18            JUSTICE GINSBURG: But it really --

19            MR. MARCUS: -- sign the --

20            JUSTICE GINSBURG: -- it really isn't.

21            MR. MARCUS: -- agreement.

22            JUSTICE GINSBURG: It's -- this is not like  
23     you sign an agreement and you're -- you can do it or  
24     you can not do it. I mean, this is a real Hobson's  
25     choice, isn't it?

1           MR. MARCUS: Well, you know, again, if you  
2 think that --

3           JUSTICE GINSBURG: You can't --

4           MR. MARCUS: -- there --

5           JUSTICE GINSBURG: -- negotiate, "I don't" --

6           MR. MARCUS: There --

7           JUSTICE GINSBURG: -- "want this part."

8           MR. MARCUS: There undoubtedly are adverse  
9 consequences to not signing the agreement.

10          CHIEF JUSTICE ROBERTS: Could you --

11          MR. MARCUS: But --

12          CHIEF JUSTICE ROBERTS: -- waive your --  
13 could you waive --

14          MR. MARCUS: But --

15          CHIEF JUSTICE ROBERTS: -- your eighth-  
16 amendment rights? You know, if your parole's revoked,  
17 you're going to go back into a very cruel and unusual  
18 prison, not the one you left.

19          MR. MARCUS: Well, I mean, I think -- I think  
20 the test would be whether it's -- whether it's  
21 reasonably the consent -- what they're asking you to  
22 agree to is reasonably related to the purposes of  
23 punishment. And, in this case, the -- you know, the  
24 supervision of the parolee, rehabilitation, protection  
25 of public safety. And so, we think the consent

1 argument works very well here.

2 But, if I could, I'd like to also address our  
3 arguments under the totality of the circumstances and  
4 special needs. Faced with a serious recidivism  
5 problem, California has made the reasonable judgment  
6 that subjecting parolees to suspicionless searches is  
7 necessary to protect public safety and to promote  
8 rehabilitation.

9 JUSTICE ALITO: What if it's the case --

10 MR. MARCUS: But --

11 JUSTICE ALITO: -- that this program would  
12 allow some searches that are -- that violate the fourth  
13 amendment, but that this particular search would not?  
14 How closely can we focus just on what happened here, or  
15 do we have to consider all the -- all the types of  
16 searches and the circumstances of searches that the  
17 California program might permit?

18 MR. MARCUS: Well, I -- no, I mean, I think  
19 typically this Court applies a very, sort of, narrowly  
20 tailored approach to fourth-amendment questions, and  
21 focuses narrowly on the context in which the search was  
22 conducted. In this case, for example, you wouldn't --  
23 you wouldn't have to reach the question of whether a  
24 search of a home was constitutional. This -- I mean,  
25 the question here is whether a search of the Petitioner

1 on a public street was constitutional. And the Court  
2 does typically limit its fourth-amendment cases to the  
3 facts presented.

4 So -- but, at the same time, in analyzing  
5 that, I think you do have to consider what the fourth-  
6 amendment standard is. And we believe the fourth  
7 amendment does impose -- the fourth amendment itself  
8 imposes restrictions on the discretion of police  
9 officers and parole officers that are meaningful, that  
10 -- as the Reyes Court said, there are restrictions on  
11 the timing, the frequency, the duration, and the  
12 oppressiveness of the search. So, police officers and  
13 parole officers are on notice that courts will review  
14 suspicionless searches very carefully. They're on  
15 notice that there are limits to what they can do. And  
16 they're --

17 JUSTICE STEVENS: But following --

18 MR. MARCUS: -- on notice that --

19 JUSTICE STEVENS: -- up on Justice --

20 MR. MARCUS: -- if a search is --

21 JUSTICE STEVENS: -- Alito's thought,  
22 supposing there were no restrictions whatsoever, but  
23 this particular search didn't seem very offensive.  
24 Would you still defend it?

25 MR. MARCUS: If there were no -- no, we --

1 no, we think there are -- the fourth amendment imposes  
2 restrictions -- time, place, and manner restrictions --  
3 on the suspicionless searches.

4 JUSTICE SCALIA: No.

5 MR. MARCUS: And so, that --

6 JUSTICE SCALIA: He's asking you, I think,  
7 Justice Alito's question, "Do we have to get into  
8 that?" So long as this one's okay, why do -- why do we  
9 have to get into whether there might be some other ones  
10 that aren't okay?

11 MR. MARCUS: I -- that's correct. I don't --  
12 I mean, I --

13 JUSTICE STEVENS: And it --

14 MR. MARCUS: -- I think you just --

15 JUSTICE STEVENS: -- it was assumed  
16 California --

17 MR. MARCUS: Right.

18 JUSTICE STEVENS: -- didn't say if they had  
19 protection against harassment and so forth. Suppose  
20 they just said, "Cart blanche, you can search any  
21 parolee at any time, any place." And then you'd ask  
22 whether this search was reasonable. Would --

23 MR. MARCUS: Right. And --

24 JUSTICE STEVENS: -- that be --

25 MR. MARCUS: -- I think, in determining that,

1     you would -- in determining it and looking at the facts  
2     of this case, you would -- you would apply a fourth-  
3     amendment standard to determine whether this search was  
4     objectively reasonable. And you would look at factors  
5     like the time, place, frequency, and manner to  
6     determine whether a search was, in fact, reasonable --

7             JUSTICE STEVENS: So, it would uphold this.

8             MR. MARCUS: -- and objective --

9             JUSTICE STEVENS: There's --

10            MR. MARCUS: -- objective --

11            JUSTICE STEVENS: -- no matter now  
12     unreasonable the California statute might be in other  
13     applications.

14            MR. MARCUS: That's correct. And it's to see  
15     whether it's objective -- whether the search in this  
16     case was objectively related to the purposes of  
17     supervision, to protect public safety, and to promote  
18     rehabilitation. That, we think, is the test under the  
19     fourth amendment. And while Petitioner points out that  
20     there are a hundred cases out there where the standard,  
21     you know, hasn't been used to throw out a search, at  
22     the same time, he hasn't pointed to any cases where a  
23     prosecution has been based on an abusive search that  
24     this standard has been too toothless to throw out. And  
25     we think that's significant, given that this type of

1 condition has been in place for over 20 years for  
2 probationers, since the Bravo decision in 1987. And  
3 the parole condition has been in place since 1996, when  
4 the Legislature authorized this and made a considered  
5 decision to switch from a reasonable-suspicion standard  
6 to a suspicionless standard for parolees.

7 JUSTICE KENNEDY: The Government -- is the  
8 Government of the United States somewhat behind the  
9 State of California? It's not efficient in -- as  
10 efficient as California in supervising its parolees?  
11 Because you don't have this rule.

12 MR. MARCUS: We don't have this program.  
13 There are -- I mean, District Courts have the authority  
14 to impose a suspicionless search condition. And some  
15 have. I think the important thing to keep in mind here  
16 is that this is a -- the Court has traditionally given  
17 a lot of deference to States in dealing with convicted  
18 felons in their criminal justice system, in making  
19 sentencing determinations, reasonable sentencing  
20 determinations, as this Court emphasized in the Ewing  
21 decision. And so, California clearly has a big problem  
22 on their hands. The recidivism rates are demonstrated,  
23 they're in the record. The -- California was  
24 responding to those high recidivism rates. They were  
25 also responding to some high-profile crimes involving

1 parolees. And the -- and, on top of that, we do have a  
2 brief that's submitted by 21 States who say that they  
3 do need this authority to effectively supervise  
4 parolees.

5 JUSTICE GINSBURG: Has --

6 MR. MARCUS: But --

7 JUSTICE GINSBURG: -- the recidivism rate  
8 gone down in the years since the Reyes decision, since  
9 this is suspicionless search, as opposed to reasonable  
10 suspicion?

11 MR. MARCUS: Well, I -- I mean, I'm not sure  
12 if the studies have been -- statistics have been, sort  
13 of, documented up to this -- to this date, but I think  
14 it's fair to say that it would be difficult to draw  
15 conclusions from those statistics, because, of course,  
16 this gives -- this provision gives the California  
17 parole and police officers more authority to conduct  
18 searches; and so, there's -- to the extent it's  
19 increasing the detection of crime, and so more people  
20 are actually being, you know, put back in prison on a  
21 parole violation or a criminal violation, it wouldn't  
22 necessarily mean that it's -- this isn't, you know,  
23 being successful in reducing recidivism, because  
24 there's --

25 JUSTICE SOUTER: Do --



1           MR. MARCUS:  -- I mean, there's that side to  
2     it, too.

3           JUSTICE SOUTER:  Even apart from the -- what  
4     -- the lack of evidence for any change since the Reyes  
5     decision, do we have any empirical evidence, perhaps  
6     involving a control group, about the likelihood of the  
7     -- this liberal search policy in reducing recidivism?

8           MR. MARCUS:  May I answer the question, Your  
9     Honor?

10          CHIEF JUSTICE ROBERTS:  Go ahead.

11          MR. MARCUS:  I think, you know, traditionally  
12     this Court has been very deferential to State decisions  
13     on -- you know, on efficacy, on whether a particular  
14     program is going to be efficacious -- I mean, cases  
15     like Martinez-Fuerte and the Sitz decision involving  
16     checkpoints for drunk driving -- in a court.  Even  
17     with, you know, very strong, you know, low efficacy  
18     rates -- in, you know, a program that's showing very  
19     low efficacy rates, the Court said that these are  
20     judgment that -- judgments that the States need to  
21     make, and they ought to be given a lot of deference,  
22     even if, you know, their -- you know, the numbers, you  
23     know, of -- don't show, by clear and convincing proof,  
24     that the problem isn't being ameliorated.

25          CHIEF JUSTICE ROBERTS:  Thank you, Mr.

1 Marcus.

2 Mr. Long, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.,

4 ON BEHALF OF PETITIONER

5 MR. LONG: In answer to Justice Alito's  
6 question, this search is unconstitutional, because the  
7 officer was completely at liberty -- he had complete  
8 discretion to decide whether to search. And it would  
9 not be acceptable if California said, "You can search  
10 anybody on the street," if the answer was, "Well, it  
11 wasn't a particularly invasive search." Granted,  
12 parolees have far less fourth-amendment rights than  
13 others, but this is so much the core of the fourth  
14 amendment. This is what the framers wrote the fourth  
15 amendment to stop, these general warrants and writs of  
16 assistance. One --

17 JUSTICE SCALIA: But we --

18 MR. LONG: -- consent --

19 JUSTICE SCALIA: -- we normally don't look  
20 into the mind of the officer to decide whether his  
21 action was okay or not.

22 MR. LONG: Well, and we're not asking you to  
23 look into the mind of the officer. It's --  
24 California's system, it's quite clear -- they admitted  
25 it here -- leaves it up to -- the officer can have any

1 reason for doing the search. It's arbitrary, in the  
2 sense this Court would use, but not California.

3 On consent, very quickly, footnote 16 of our  
4 reply brief, the California Supreme Court has said  
5 repeatedly that -- including very recently, since this  
6 Section 3067 -- that parole is not a matter of consent;  
7 it is imposed on you. This is a question of State law.

8 Perhaps this Court would read the State law  
9 differently. But, as the Court said in Griffin, the  
10 State Supreme Court is the last word on the questions  
11 of State law.

12 As to abuses, there are a number. One that  
13 I'll just mention, the California Supreme Court has  
14 held that it's perfectly okay -- if the officer knows  
15 somebody in the house is on parole or probation, they  
16 can use that as a lever to go in and search to try to  
17 find evidence about somebody else who's in the house.  
18 That is permissible under the California standard.

19 But the bottom line here is that this type of  
20 search regime is at the core of the prohibition of the  
21 fourth amendment. It's what the framers wrote the  
22 fourth amendment to prohibit. So, if parolees have any  
23 fourth-amendment rights, other than, you know, an  
24 essentially useless arbitrary-and-capricious standard  
25 that's never going to work, the fourth amendment has to

1     prohibit this search. There are many other things the  
2     States can do. They have many options. This is at the  
3     endpoint on the spectrum.

4             Thank you.

5             CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

6             The case is submitted.

7             [Whereupon, at 11:18 a.m., the case in the  
8     above-entitled matter was submitted.]

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